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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONTROLLER OF THE STATE OF CALIFORNIA
AND
COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,

Petitioners,

V.

ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS WHITE AND BULLOCK

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Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964) 27
Vestal, *Res Judicata/Preclusion: Expansion*, 47 So. Cal. L. Rev. 357 (1974) 27
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STATEMENT OF THE CASE

The seeds of this lawsuit sprouted from the grave of an abortive original action filed by the State of California on November 11, 1977. *California v. Texas,* 437 U.S. 601 (1978). That original action, in turn, had evolved from lengthy probate court litigation in Houston over the domicile of Howard Hughes. Following sixteen months of intensive discovery and trial preparation in the Texas case—during which time Petitioners gave no indication that they intended to press any domicile claim with respect to Hughes—California emerged on the eve of the Houston trial and attempted to barter access to this Court's original jurisdiction in return for a chance to collect most of its death taxes regardless of the merits of a California domicile claim.[1]

This Court properly refused to enjoin the Texas domicile trial. *California v. Texas,* order no. A-433, 434 U.S. 993 (Dec. 12, 1977). That trial lasted eleven weeks and resulted in a jury verdict, and, subsequently, a final judgment, that Hughes died domiciled in Texas. Respondent Lummis and one potential legatee appealed from that judgment.

California's motion for leave to file an original action was unanimously denied on June 22, 1978. *California v. Texas,* 437 U.S. 601 (1978). In response to the concurring opinions accompanying that decision, the Hughes estate (hereinafter "the Estate") filed this interpleader action in the United States District Court for the Western District of Texas, Austin division, on July 14, 1978. (J.A. 1). The District Court promptly restrained all parties from proceeding with Hughes domicile litigation in any other

1. As the Court may recall, the primary agreement between California and the Hughes estate was contingent upon this Court's exercise of original jurisdiction over California's suit against Texas. It provided that California would receive 2% of the federal net taxable estate if the Court accepted jurisdiction and determined that Hughes was a domiciliary of Texas at his death. California was to receive 18% of the federal net taxable estate if this Court determined that Hughes was domiciled anywhere other than Texas. A supplemental letter agreement also obligated the Hughes estate to furnish California with copies of pleadings, depositions and documentary evidence relevant to domicile, along with providing its attorneys for consultation to aid California in its suit against Texas. The texts of these agreements were set forth as appendices "E" and "F" to Texas' brief in opposition filed in *California v. Texas, supra.*

forum. On August 3, 1978, the Texas taxing officials, respondents White and Bullock, filed a motion to dismiss, asserting primarily that the action was barred by the Eleventh Amendment and the doctrine of collateral estoppel. (J.A. 14).

In the fall of 1978, Petitioners, who had obtained an extension of time to respond to the original complaint, persuaded the District Court that issues of joinder and venue should be resolved prior to a determination of subject matter jurisdiction. Petitioners then filed two companion motions. (J.A. 21, 22). The first they accurately describe as a motion to join some twenty-two alleged heirs as defendants. (Pet. for Cert. 4). The second is incorrectly portrayed as a lofty, magnanimous motion brought solely to transfer the action to a "neutral forum," the District of Colorado. (*Id.*). Petitioners also alternatively sought in that motion to transfer the case to Los Angeles, California. (J.A. 23). In November of 1978, the District Court denied Petitioners' motions to add parties and change venue. (Pet. App. D & E).

Unable to effect a transfer of the case, Petitioners filed a motion to dismiss in February of 1979, based upon grounds similar to those asserted earlier by respondents White and Bullock. The District Court granted the motions to dismiss. ***Lummis v. White,*** 491 F.Supp. 5 (W.D. Tex. 1979). (Pet. App. G). Respondent Lummis appealed, and Petitioners cross-appealed, seeking a transfer of the case to a federal district court in Colorado. The Court of Appeals reversed the finding of no jurisdiction but affirmed the denial of Petitioners' motions to add parties and change venue. ***Lummis v. White,*** 629 F.2d 397 (5th Cir. 1980). (Pet. App. A).

Having again failed in their attempt to transfer the case to another district court, Petitioners filed with this Court a petition for certiorari and a second motion for leave to file an original action against Texas. Now preferring to proceed in this Court only, Petitioners have made certain changes to help achieve that goal. First, they alter their earlier position and argue for the first time that no district court has jurisdiction over this action because 28 U.S.C. §1251(a) vests original jurisdiction exclusively with this Court. ***See*** Petitioners' Brief (hereinafter "Pet. Br.") at

17-26. Second, after this case was submitted on oral argument to the Court of Appeals, California revised its inheritance tax laws in a manner which Petitioners now assert undercuts the jurisdictional basis of an interpleader action in district court. (Pet. Br. at 32-36). And, finally, Petitioners manipulate the style of the case —which had been "Lummis v. White" in the lower courts, and here logically should be "Cory v. Lummis"—to emphasize in a very cosmetic fashion their position that this is in actuality a suit between states.

This action arises as a result of the death of Howard Robard Hughes, Jr., on April 5, 1976, and the efforts of Petitioners and respondents White and Bullock to impose domicile-based death taxes on the Hughes estate.

Mr. Hughes was born in Houston, Texas, on December 24, 1905. His father was an inventor and manufacturer. His mother, a member of a prominent family that settled in Texas in 1856, died in 1922. When his father died in 1924, a Houston court removed the disability of minority from the nineteen-year-old Hughes and allowed him to take control of Hughes Tool Company, a Houston corporation that manufactured oil well equipment.

In June of 1925, Mr. Hughes married Ella Botts Rice, a member of the distinguished Houston family for whom Rice University is named. Mr. Hughes developed interests in filmmaking and aviation and began making trips to Los Angeles, California to pursue those avocations. By 1929, when Mrs. Hughes obtained a divorce in Houston, Mr. Hughes had begun to spend a considerable amount of his time in southern California. For the next two decades he traveled extensively, spending much of his time making cross-country test flights. While Mr. Hughes based his aviation and movie activities in California, he spent much of his time traveling during this period, predominantly on the East Coast.

In 1940 Mr. Hughes registered with a Houston draft board and was given a deferment to continue his airplane and armament manufacturing in Texas and California during World War II. In sworn testimony in 1947 before a Senate committee investigating claims of profiteering on wartime contracts, he gave his residence as Houston, Texas and stated that his company was headquartered

there. He expressed disdain at the attempt to impugn his integrity, stating, "I believe I have the reputation in that respect which most Texans consider important. That is to say, if I may use a corny phrase, I believe people consider my word to be my bond." Testifying in a state court civil trial in California in 1952, Mr. Hughes stated that although he was then staying at the Beverly Hills Hotel, his domicile was Houston, Texas.

From 1950 until 1966 Mr. Hughes spent most of his time in California, although he was also in Nevada, Florida, Canada and the Bahamas for significant periods of time. The majority of his time in California during this period was spent at the Beverly Hills Hotel, where he rented rooms on a day-to-day basis.

From 1966 until his death, Mr. Hughes stayed in hotels in Boston, Las Vegas, the Bahamas, Nicaragua, Vancouver, London and Acapulco. Throughout his travels—indeed, throughout his entire life—Hughes listed Houston, Texas as his residence on his passports, on all of his federal income tax returns, and on all state income tax returns he was required to file. On April 5, 1976, Mr. Hughes was placed on a private jet in Acapulco, Mexico, bound for Methodist Hospital in Houston, Texas. He died en route shortly after the plane passed over Brownsville, Texas. Mr. Hughes was buried next to his parents in Houston's Glenwood Cemetery. He had maintained a family burial plot since his father's death in 1924 but did not finally purchase a perpetuity deed thereon until 1973, soon after he had undergone major surgery in London for a hip injury that was to keep him bedridden for the remaining three years of his life.

On April 14, 1976, probate proceedings were begun in California, Texas and Nevada. A purported will of Mr. Hughes, dated March 19, 1968 (the "Mormon" will), containing substantial bequests to several charitable organizations (including the University of Texas and Rice University), surfaced in late April of 1976 and was offered for probate in California, Nevada and Texas. Howard Hughes Medical Institute ("HHMI"), a non-profit corporation, appeared and asserted that Mr. Hughes had executed and never revoked a valid will (the "lost" will) leaving his entire estate to HHMI.

The Texas Attorney General entered an appearance for the State of Texas in the Houston probate proceeding on June 10, 1976, asking the Court to determine the validity of any purported will of Mr. Hughes and to declare Texas his domicile at the time of death. After extensive discovery a trial of the issues of domicile and the validity of the Mormon will was held in Houston beginning November 14, 1977. After three months of trial, including the testimony of some seventy-three witnesses and the introduction of 1,619 exhibits, the jury found that Mr. Hughes was domiciled in Texas at death and that the Mormon will was invalid. Judgment to that effect was subsequently entered. (J.A. 139).

Final judgment has also been rendered in Nevada that the Mormon will is invalid. Final judgment has been rendered against HHMI in Nevada on the lost will; the Houston probate court recently entered a summary judgment against HHMI on the lost will, which judgment has been appealed.

Proceedings to determine heirship are continuing in the Houston probate court. In separate proceedings undertaken between July and September, 1981, that Court has entered summary judgment against three women who contend they were legally married to Hughes at the time of his death; all three have appealed. In a non-jury trial, the Court has determined the maternal heirs of Hughes, and in a subsequent two-week jury trial, a jury verdict has been received as to the paternal heirs. Formal judgments have not as yet been entered, and in all likelihood appeals will follow.

Efforts to valuate the Hughes estate are also being made by taxing officials. The Internal Revenue Service has valued the gross estate at $468,085,903. The Hughes estate is contesting this valuation in United States Tax Court. The California inheritance tax referee has valued the gross estate at $1,106,345,561. Although the Texas valuation has not been released to the public, it more closely approximates the Internal Revenue Service valuation than the California valuation.

On July 21, 1981, Petitioners filed a "Motion To Temporarily Remove Original Exhibits" with Harris County Probate Court No. 2 in Cause No. 139,362 entitled The Estate of Howard R. Hughes, Jr., Deceased, the ongoing cause of action in which all of the

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aforementioned domicile and heirship litigation in Texas has ensued. Petitioners' motion was granted by the Honorable Pat Gregory, judge of said court. Respondents White and Bullock have filed in said court a response to petitioners Cory's and Alvord's appearance, and have joined issue with them as to the domicile of decedent, Howard R. Hughes, Jr. in the Houston Probate Court.

SUMMARY OF ARGUMENT

The death of Howard Hughes has spawned two bilateral disputes about his estate's liability for state death taxes: one between the Estate and the taxing officials of California, and the other between the Estate and the taxing officials of Texas. In an effort to avoid the possibility of double state death taxation, the Texas administrator of the Estate filed this action under 28 U.S.C. §1335 in federal district court in Austin, Texas, interpleading those state taxing officials and seeking a unitary determination of Hughes' domicile at the time of his death. This case presents for review the Fifth Circuit's decision that this statutory interpleader action is jurisdictionally sound and that the denial of a motion to transfer the case to Colorado was not an abuse of discretion.

The obvious impediment to the exercise of jurisdiction under section 1335 in this case is *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937), which holds that the Eleventh Amendment bars such an action. However, serious doubt has been raised about the present vitality of *Worcester County,* and only this Court can resolve that question. *See California v. Texas,* 437 U.S. 601 (1978). If the Eleventh Amendment still bars this action, these separate controversies which the Estate has concerning its liability for state death taxes should be remitted to state courts, which have traditionally resolved these disputes. These bilateral disputes involving the Estate do not comprise a suit between states, no controversy now exists between the State of California and the State of Texas over this matter, and original jurisdiction in this Court is therefore not present.

If, on the other hand, the Eleventh Amendment is no longer a bar, statutory interpleader jurisdiction is present in this case. 28 U.S.C. §1251(a) does not preclude this action because it is simply not one between two states. And the minimal diversity require-

ment of section 1335 is satisfied by the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of Los Angeles.

Petitioners requested the district court to transfer this case either to Denver or Los Angeles. Because such a transfer can only be made to a district where the action "might have been brought" originally (28 U.S.C. §1404(a)), and because no claimant resided in Colorado to support venue there (28 U.S.C. §1397), Petitioners also moved to add twenty-two potential heirs of Hughes as parties. The district court correctly determined that transfer to Los Angeles was not justified by the convenience of the litigants and witnesses, and that the transparent attempt to manipulate venue through the artificial device of joining the heirs was inappropriate. The heirs clearly should not be joined because they have no role to play in this litigation. Their interests are fully represented by the administrators of the Estate, and the heirs will therefore be bound by any domicile determination without being made parties.

Finally, even if the Court should order joinder of the heirs, this case should not be transferred to Colorado. Such a transfer would mean incredible inconvenience to all of the litigants and virtually all of the scores of potential witnesses. Moreover, such a transfer would astronomically increase the litigation expenses for all parties. Petitioners' unfounded fears of local prejudice in Austin, Texas cannot override the determinations by the District Court and Court of Appeals that Austin is the most convenient and appropriate forum for the litigation. That determination does not constitute an abuse of discretion.

ARGUMENT

Introduction

When California unsuccessfully sought to invoke this Court's original jurisdiction in 1978, it did so announcing that its proposed action against Texas was motivated in large part by its "own sense of fairness" regarding the situation confronting the Hughes

estate.[2] Revelation of the covert contractual link between California and the Estate—essentially an attempt to barter access to this Court's original jurisdiction—was an early clue that California's interpretation of "fairness" might be somewhat unique. Now, with four members of this Court suggesting that 28 U.S.C. §1335 provides the Estate with a remedy for the perceived unfairness of double state death taxation and Petitioners with their desired unitary adjudication of domicile, Petitioners oppose that interpleader remedy primarily because its venue is "unfair" and "unseemly". (Pet. Br. at 6, 10, 11, 16 & 45). While Petitioners' sense of fairness has apparently been tempered by a healthy dose of self-interest, it is as misdirected now as it was in 1978. For Petitioners now attempt to convert their dissatisfaction with venue in this case into jurisdictional principles which would eliminate the interpleader remedy for similarly situated estates in most future cases.

While the Texas taxing officials certainly have not warmly embraced the proposed interpleader remedy[3], if this Court determines

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2. At oral argument on the motion for leave to file complaint, counsel for California stated:

> MR. FALK: "Finally, another factor that I want to mention just briefly that brought us here and I think is important for this Court's exercise of jurisdiction was our own sense of fairness. To have proceeded independently to litigate the tax claim in our own courts, as Texas sought to do, even if we could do so, *Western Union* notwithstanding, simply did not comport with our notion of a fair and appropriate process." (Tr. of oral argument in *California v. Texas*, No. 76, original, March 29, 1978 at p. 19)

3. From the outset of this litigation, the taxing officials of the State of Texas have believed and argued that *no* federal court has jurisdiction to relitigate the Texas state court determination that Howard Hughes was domiciled in Texas for purposes of the Texas inheritance tax. That position has been grounded primarily upon the Eleventh Amendment and the doctrine of collateral estoppel, and secondarily upon concepts of federalism embodied, *inter alia*, in the Tenth

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that the federal system itself should provide a solution to multiple state death taxation, it is submitted that an action under section 1335 is the only available remedy—and certainly the most expeditious and reasonable one. For either *Texas v. Florida,* 306 U.S. 398 (1939), was wrongly decided and an original action in this Court is completely unavailable, or *Texas v. Florida* was correctly decided and provides relief in so precious few cases that it is no remedy at all. Therefore, if the Court decides that the Eleventh Amendment bars actions such as this under section 1335, these domicile disputes should be resolved by the state courts, which have traditionally handled issues of state tax law.

If this interpleader action can proceed consistently with the Eleventh Amendment, the fact that venue is laid in a state asserted to be the decedent's domicile is neither improper nor jurisdictionally debilitating. In this case, venue options are limited to districts located within California and Texas. 28 U.S.C. §1397. But even if choice of venue were unrestricted, it would be a grievous error to transfer this litigation to Colorado.

Several factors commend trying a case such as this in one of the claimant states. Many of these reasons are set forth in 28 U.S.C. §1404(a) and in the judicial interpretation of that statute. As this Court has noted, venue "is primarily a matter of choosing a convenient forum." *Leroy v. Great Western United Corp.,* 443 U.S. 173, 180 (1979); *Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen,* 387 U.S. 556, 560 (1967). In this case, the District Court considered *all* of the factors under section 1404(a), weighed all evidence submitted pertaining to each of those factors, and appropriately concluded that this litigation was better venued in Austin than in Los Angeles. (Pet. App. F). In light of that ruling—which Petitioners did not appeal— section 1404(a) cannot possibly countenance the proposed transfer to Colorado, where all parties, witnesses, and

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Amendment, the Tax Injunction Act (28 U.S.C. §1341), and the abstention doctrines. These various jurisdictional objections all implicate, to some extent, the same concerns of federalism bound up in the Eleventh Amendment issue which this Court now faces.

attorneys will be greatly inconvenienced, all parties put to an enormous increase in litigation expense, and the courts and populace of Denver saddled with the many burdens and costs inherent in the lengthy trial of this case. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

Petitioners have consistently lashed out at any argument opposing transfer on the grounds of inconvenience and expense as disingenuous and view opposition to a transfer of the case from Austin to Denver as buttressing their position that Austin venue is improper—*i.e.*, since the Texas officials want to try the case in Austin, Petitioners' fears of local prejudice must be valid. *See* Petitioners' Reply Br. on Cert. at 8. Respondents White and Bullock know of no way to convince the Court that their true concerns are the convenience and availability of the anticipated witnesses, parties and counsel; minimizing further expenditures on this case, which, because of the prior state court trial, has already cost Texas a huge sum; and a reluctance to impose the excessive expenditures of time and money on the courts and populace of Denver, which has absolutely no connection with this controversy. No more can be done to demonstrate the sincerity with which Respondents White and Bullock believe that local prejudice—either in Texas or in California—will not be a significant factor at any trial of this case than this: if the Court should decide that the issue of Hughes' domicile should be tried in a federal district court under section 1335, and if the Court should feel for any reason that venue in Austin, Texas is improper and must be transferred, the Texas taxing officials would ask the Court to send this case to Los Angeles rather than to Denver. For while Los Angeles is clearly a less convenient forum for this litigation than Austin, Denver is, by far, the least appropriate place to try this case. And Respondents White and Bullock firmly believe that the trial judge—whether sitting in Austin or Los Angeles—can protect the litigants from any possible danger of local bias or prejudice.

I. The Resolution of the Issues Presented Hinges on the Eleventh Amendment Question

A unanimous, unreversed decision of this Court holds that an interpleader action such as this one is barred by the Eleventh

Amendment. ***Worcester County Trust Co. v. Riley,*** 302 U.S. 292 (1937) (hereinafter "***Worcester County***"). Four Justices of this Court, however, have suggested that the holding of ***Worcester County*** has been undercut by ***Edelman v. Jordan,*** 415 U.S. 651 (1974) (hereinafter "***Edelman***"). ***California v. Texas,*** 437 U.S. 601 (1978) (Brennan, J., concurring), 608 n. 10 (Stewart, J., concurring), 615 (Powell, J., concurring). This Eleventh Amendment issue appears even further clouded because several members of the Court, for various reasons that may or may not affect this case, feel that ***Edelman*** itself was wrongly decided. ***See Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Ass'n,*** ____U.S.____, 101 S.Ct. 2008 (1981). All that is clear is that Eleventh Amendment interpretation—already cluttered with more than its share of judicial debris during the 183 years since its ratification—is still unsettled.

The Texas taxing officials argued below and still believe that the holding of ***Worcester County*** remains good law, completely unscathed by ***Edelman. Edelman*** involved a class action suit brought against Illinois officials administering the federal-state programs of Aid to the Aged, Blind and Disabled in violation of numerous federal regulations. The district court granted a permanent injunction requiring compliance with those regulations and further ordered the Illinois officials to pay benefits wrongly withheld during the preceding three years. 415 U.S. at 656. The Seventh Circuit affirmed that order, rejecting the officials' argument that the Eleventh Amendment prohibited the order requiring retroactive benefit payments. ***Jordan v. Weaver,*** 472 F.2d 985, 989-995 (1973). This Court reversed, holding that the Eleventh Amendment did bar such retroactive monetary relief against the State of Illinois. 415 U.S. at 678. The Court concluded that unconsented suits brought in federal courts to recover money from a State were incompatible with the purpose and past interpretation of the Eleventh Amendment. 415 U.S. at 660-663. The line between retroactive relief from state treasuries and prospective injunctive relief against state officials was thus drawn by the Court in ***Edelman*** simply by connecting the dots of its past decisions. 415 U.S. at 663; ***see Kennecott Copper Corp. v.***

State Tax Comm'n, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

In hewing that line, the Court rejected the theory— espoused by the Seventh Circuit (472 F.2d at 990 n. 10, 990-992)—that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), can be used to permit retroactive relief as well as injunctive relief against future conduct. 415 U.S. at 666. By doing so, the Court closed a gap in Eleventh Amendment law and provided the States with *additional* protection against suits in federal court. Nothing in the analysis or holding of *Edelman* suggests that the Eleventh Amendment is now so withered that it allows *all* suits which seek only prospective relief from state officials.

The threshold inquiry under *Ex parte Young—i.e.*, whether the alleged actions of the state officials conflict with paramount federal law—must still be made before those officials can be stripped of their official character and Eleventh Amendment immunity, thereby permitting prospective injunctive relief against them. It is that very inquiry which the unanimous court in *Worcester County* resolved in favor of the state taxing officials. Nothing has occurred since 1937 to undermine the determination in *Worcester County* that the actions of those officials did not contravene federal or state law, and were therefore the actions of the sovereign States. *See California v. Texas, supra*, 437 U.S. at 612 and n. 13 (Stewart, J., concurring). The analysis and holding of *Edelman* thus appear to leave the Eleventh Amendment holding of *Worcester County* completely untouched.

The continuing vitality of *Worcester County* will, of course, hinge on this Court's view of the present development and role of the Eleventh Amendment. While such a significant constitutional decision will certainly not be founded on its results in this particular case, it is helpful to focus on the effect of the Eleventh Amendment decision on the options facing the Court in this case.

A. If This Action Is Not Barred by the Eleventh Amendment, Interpleader Jurisdiction Is Satisfied.

If this Court should determine that the Eleventh Amendment no longer precludes an action such as this, the Fifth Circuit's decision

that this case satisfies the jurisdictional prerequisites of 28 U.S.C. §1335 should be affirmed. The Fifth Circuit based statutory interpleader jurisdiction upon the diverse citizenships of plaintiff Lummis and defendant Alvord, the County Treasurer of the County of Los Angeles. ***Lummis v. White,*** 629 F.2d 397, 402-403 (1980). Petitioners argue that the citizenship of neither Lummis nor Alvord may be used to fulfill the diversity requirement of section 1335 and that district court jurisdiction is barred by 28 U.S.C. §1251(a) because this is a controversy "between two ...states" within this Court's exclusive jurisdiction. All of these arguments are quite wide of the mark, and statutory interpleader jurisdiction is present.

1. 28 U.S.C. §1251(a) Is Irrelevant to Jurisdiction Under 28 U.S.C. §1335.

If the Eleventh Amendment does not bar a federal district court from entertaining this interpleader action, the provisions of 28 U.S.C. §1251(a) would certainly not do so. For if this case can proceed consistently with the Eleventh Amendment, it will have already been determined that this is not a suit against either the State of California or the State of Texas. It surely cannot then be considered a suit ***between*** the two states if it is not a suit against either state. For this reason, section 1251(a) adds nothing to the Court's determination of whether this action can be tried in a federal district court.

It is interesting to note that no party to this litigation ever asserted in the lower courts that no federal district court can entertain this case because jurisdiction rests exclusively with this Court. In fact, Petitioners, in an effort to induce a transfer to a federal district court in Colorado, argued below that such a transfer would cure all jurisdictional defects. The District Court and Court of Appeals would be amazed and boggled to learn that Petitioners now assert that no district court, regardless of location, can exercise jurisdiction over this case.[4] Petitioners downplay this stagger-

4. For example, in oral argument before the Fifth Circuit Petitioners' counsel stated as follows:

MR. FALK: No, we don't want to play any procedural

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ing change in position, selflessly attributing it to oversight by counsel, and argue that it is irrelevant because jurisdictional issues may be raised at any time. (Pet. Reply Br. on Cert. at 1 n. 1). This flip-flop is significant, however, for it underscores the invalidity of Petitioners' argument under section 1251(a). Counsel failed to see only what was never there. Petitioners have always realized that section 1251(a) is ultimately irrelevant to statutory interpleader jurisdiction.

2. The Diversity Requirement of 28 U.S.C. §1335 Is Met.

Petitioners argue that the citizenships of the defendant state taxing officials cannot be used to satisfy the diversity requirement of section 1335 because the states themselves are the real parties in interest, and states are not "citizens of a state" for diversity purposes.[5] ***Postal Telegraph Cable Co. v. Alabama,*** 155 U.S. 482 (1894). (Pet. Br. at 27). The Fifth Circuit did not address this contention, for it found the requisite minimal diversity in the citizenships of plaintiff Lummis and defendant Alvord, the County

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> game. And I understand why the result in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act. (Tr. of March 31, 1980, 5th Cir. Arg. at p. 19)

Such representations are hardly consistent with Petitioners' current position that 28 U.S.C. §1251(a) precludes this action from being heard by any court save this one.

5. If this Court holds that the Eleventh Amendment does not bar this action, it may also be called upon to decide for the first time whether the doctrine of ***Ex parte Young, supra,*** not only strips state officials of their official character for purposes of the Eleventh Amendment but also renders them individual citizens for purposes of diversity analysis under 28 U.S.C. §1332 (and therefore under §1335 as well). If this question is answered affirmatively, diverse citizenships will abound in this case.

Treasurer of the County of Los Angeles. While Petitioners argue that the citizenship of neither of these gentlemen can be used to satisfy section 1335, in fact the citizenships of these men alone are sufficient to meet the requirements of the interpleader statute.

First, the Court of Appeals ruled that the citizenship of plaintiff Lummis can be considered because, as an administrator of the Hughes estate, he is an interested stakeholder and therefore a claimant. *Lummis v. White, supra,* 629 F.2d at 403. That ruling comports with the overwhelming weight of the case law and commentary, which permit and urge the broadest possible application of interpleader. *See, e.g., Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D.Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477 n. 8 (E.D.La. 1960); 7 C. Wright and A. Miller, *Federal Practice & Procedure,* §1710 at 405-407 (1972); *cf. State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967) (§1335 requires only "minimal diversity").

Unable to cite a single case to support their position, Petitioners instead offer some examples to demonstrate how consideration of an interested stakeholder's citizenship will have an untoward effect on established principles of diversity jurisdiction. (Pet. Br. at 30-31). In the first example, Petitioners posit a simple bilateral dispute between an insurer from one state and a claimant from a second state and contend that the ruling below would provide jurisdiction for such an action under section 1335. Such a case obviously cannot be brought under section 1335 because it is not an interpleader or in the nature of interpleader—a threshold requirement under the statute—for the simple reason that the stakeholder is faced with only a single claim to the stake in his possession. By contrast, in the case at bar, while the citizenships of only Lummis and Alvord were used to satisfy the diversity requirement of section 1335, the additional claims of the state taxing officials were viewed by the Court of Appeals as creating the requisite situation in the nature of interpleader.

Petitioners' next example is no more instructive than the first. It suggests that an interested stakeholder, as a "claimant" under sections 1335 and 1397 (venue), would be able to bring suit in the

place of his own residence, thereby causing unthinkable forum abuse. The specific example is of a Delaware insurer who denies liability to, and then interpleads, a dozen California (or west coast) claimants and forces them to litigate their claims in Delaware, despite the fact that none of those claimants had any prior contacts with Delaware. It is strange for Petitioners to mention this type of potential forum abuse when that is precisely what they seek the Court to do in their motion to transfer this case to Colorado. For no party to this case has any prior contacts with the State of Colorado.

Clearly, the solution to the forum abuse posed by Petitioners' example would be a motion by any of the west coast claimants to transfer the hypothetical case from Delaware to California for the convenience of the witnesses and parties, and to promote the interest of justice. Courts will not permit plaintiffs "an unfettered choice" of districts and will not allow litigation to proceed in a forum with no relation to the case. ***Leroy v. Great Western United Corp., supra,*** 443 U.S. at 185; ***Gulf Oil Co. v. Gilbert, supra,*** 330 U.S. at 508-509. In fact, the obvious merit to such a 1404(a) motion underscores why Petitioners' motion to transfer this case was properly denied.

In sum, Petitioners' contention that the citizenship of an interested stakeholder cannot establish diversity under section 1335 is most clearly laid to rest by the analysis of Professor Wright:

> "Nevertheless, once an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute." (7 C. Wright & A. Miller, ***supra,*** at 407)

The citizenship of plaintiff Lummis can therefore be utilized to fulfill the diversity requirement of section 1335.

Second, Petitioners argue that the citizenship of petitioner Alvord can no longer satisfy the diversity requirement of section 1335 due to changes in California inheritance tax law which took effect after the Fifth Circuit's ruling in this case.[6] It is clear that California's deletion of petitioner Alvord from its tax collection scheme, a unilateral action taken after oral argument before the Fifth Circuit, cannot dissipate previously existing jurisdiction in this case. Few principles have been longer, or more firmly, established than that jurisdiction is determined when the original complaint is filed and that later occurrences are irrelevant. ***Smith v. Sperling,*** 354 U.S. 91 n. 1 (1957). Chief Justice Marshall unequivocally announced the governing rule in 1824:

> "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." (***Mollan v. Torrance,*** 22 U.S. (9 Wheat.) 537, 539 (1824))

That rule is, of course, still followed today. ***See, e.g., Hill v. Rolleri,*** 615 F.2d 886, 889 (9th Cir. 1980); ***Wigand v. Flo-Tek Inc.,*** 609 F.2d 1028, 1032-33 (2d Cir. 1980). Were that not the law, diversity jurisdiction would be purely ephemeral because a defendant—or, on appeal, any litigant dissatisfied with the result below—could always change his domicile to match that of an opposing party and seek dismissal for lack of jurisdiction. For that very reason, California's voluntary revision of its inheritance tax laws after this suit was on appeal cannot affect the evaluation of jurisdiction in this case.

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6. Under California law in force at the time Hughes died and at the time this interpleader action was filed, Alvord would collect any inheritance tax due from the Hughes estate and retain for the County a percentage of the amount so collected. ***See*** Calif. Rev. & Tax. Code §§14104, 14795 (1979). In the summer of 1980—after oral argument, but months prior to a decision in the Fifth Circuit—California passed a bill, which became effective on January 1, 1981, deleting the role of county treasurers in the tax collection process. (App. to Pet. for Cert. 38f). Petitioners made no effort to apprise the Court of Appeals of this revision prior to its decision and first did so on January 15, 1981—only after their petition for rehearing ***en banc*** had been denied—in an out-of-time petition for rehearing that the Fifth Circuit refused to file.

B. If the Eleventh Amendment Bars This Action, State Courts Should Resolve This Controversy Over State Inheritance Taxes.

Both probate matters and issues of state tax law have traditionally fallen into the domain of the states and their judicial systems. ***See Sutton v. English***, 246 U.S. 199 (1918); ***Markham v. Allen***, 326 U.S. 490 (1946); and ***Commonwealth Edison Co. v. Montana***, ____U.S.____, 101 S.Ct. 2946, 2956 (1981); ***see also*** 28 U.S.C. §1341; ***Rosewell v. LaSalle Nat'l Bank***, ____U.S.____, 101 S.Ct. 1221 (1981). If the Court decides that this matter should not be litigated in a federal district court, state courts should be allowed to resolve these controversies. That is the only alternative to statutory interpleader because this is not a suit between states within this Court's original jurisdiction. Furthermore, this alternative should not be at all unpalatable to the Court or to the Hughes estate, because it is highly unlikely that inconsistent adjudications of domicile would result. The State of California, by and through its taxing officials Cory and Alvord, has recently entered an appearance in the Texas state court probate proceeding which is ongoing with respect to the Hughes estate, and that court now has jurisdiction over the requisite parties to make a unitary, binding determination of domicile.

1. Original Jurisdiction In This Court Is Not Present.

As a conceptual matter, the dispute California and Texas both have with the Hughes estate over its liability for state death taxes is not a suit between states within this Court's original and exclusive jurisdiction. And as a practical matter, even if this suit could be classified as one between states, this case, and others like it, should not be resolved in this Court. Justice Stewart correctly analyzed the premises underlying ***Texas v. Florida, supra***, and accurately demonstrated why that case was wrongly decided and why, therefore, this case is not original action material. ***California v. Texas, supra***, 437 U.S. at 602-615.

Although Petitioners contend they are on a collision course with the State of Texas over the issue of Hughes' domicile for purposes

of death taxation, the paths of the two states' taxing officials in this respect actually run parallel. Each is pursuing an independent death tax claim, and "there is no constitutional impediment to both California and Texas imposing death taxes upon the Hughes estate by proceedings in their own courts." *Id.*, 437 U.S. at 612 n. 13; *see Worcester County, supra*, 302 U.S. at 299. The alleged theoretical inconsistency of the two domicile claims is irrelevant in an original action because the basis of the Texas tax—be it domicile or some other concept[7]—is of absolutely no concern to Petitioners. From Petitioners' standpoint, any Texas tax judgment, regardless of its nature, is indistinguishable from a "judgment upon a simple contract debt...." *Milwaukee County v. White Co.*, 296 U.S. 268, 276 (1935). Therefore, Petitioners' only legitimate interest—the collectibility of a potential tax judgment—is wholly unrelated to domicile.

Thus, Hughes' death has generated two bilateral disputes—one between his estate and Texas, and another between his estate and California—over the issue of domicile and the right to impose death taxes. But the only possible dispute between California and Texas would simply be over money, not domicile or the right to tax. As Justice Stewart noted, that potential dispute—which is more

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7. It was established long ago that two states can collect death taxes on the transfer of a decedent's intangible property. *Blackstone v. Miller*, 188 U.S. 189 (1903). For a brief period during the 1930's this rule was temporarily reversed. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932). The Court soon recognized its error, however, and returned to the rule of *Blackstone v. Miller, supra*. *See Curry v. McCanless*, 307 U.S. 357 (1939); *Graves v. Elliott*, 307 U.S. 383 (1939). In 1942 this Court officially overruled *First Nat'l Bank v. Maine, supra*, and held that "there is no constitutional rule of immunity from taxation of intangibles by more than one State." *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942). And this Court's view of permissible state taxation is even broader today. *See, e.g., Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976).

It is therefore clear that Texas, if its statutes so provided, could constitutionally impose death taxes unrelated to domicile on the intangibles of the Hughes estate. Such a tax would impinge upon California's ability to collect any death tax judgment it might eventually obtain in exactly the same fashion as a domicile-based tax.

analogous to a bankruptcy proceeding than to a suit in the nature of interpleader—is unlikely ever to constitute a controversy between states, and surely does not until ***both*** states have tax judgments which the estate cannot pay and thus occupy the "status of unsatisfied creditor." 437 U.S. at 615 n. 15.

In addition to the conceptual problem of categorizing these controversies as a suit between states, several practical reasons counsel against this matter being resolved in this Court. First, because the domicile issue underlies only the bilateral dispute each state has with the estate and not that between the states themselves, an original action under *Texas v. Florida* would inappropriately eliminate the parties' right to have a jury resolve the domicile question. A right to jury trial apparently does not exist in a suit between states tried in this Court. *See, e.g.,* 28 U.S.C. §1872 (right to jury in original actions at law against citizens of the United States). The usual procedure, which was utilized in *Texas v. Florida,* is to appoint a special master, who takes evidence and prepares findings of fact and conclusions of law. While the master's recommendations are advisory only, "this Court regularly acts on the basis of the master's report and exceptions thereto." *United States v. Raddatz,* 447 U.S. 667, 683 n. 11 (1980). *See Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 511 (1971) (Douglas, J., dissenting). With all respect, this Court is simply too ill-equipped, and too overburdened, to function effectively as a trial court for this case. *See Maryland v. Louisiana,* __U.S.__, 101 S.Ct. 2114, 2137 (1981) (Rehnquist, J., dissenting).

Second, an original action under *Texas v. Florida* cannot, as Petitioners suggest, provide a wholesale remedy for future domicile disputes. For even Petitioners now concede that jurisdiction under *Texas v. Florida* cannot be invoked unless the tax claims of the competing states, together with the federal estate tax, exceed 100% of the estate's assets, such that one state's claim will be at least partially uncollectible. (Pet. for Cert. 14 n. 14). Effective shortly after Hughes' death, the maximum rate of the federal estate tax was reduced from 77% to 70%, with no corresponding reduction in the amount of the maximum available credit for state death taxes. *See* 26 U.S.C. §§2001, 2011 (1976). Thus, claims by on-

ly two states—even where one has extremely high maximum death tax rates exceeding the federal credit, such as California's rate of 24%, rather than the customary "pick-up tax" which falls within the federal credit— would not exceed that 100% jurisdictional limit even on the largest of estates. On a "small" estate of two million dollars, which would incur a maximum federal estate tax rate of 45%, it would take competing domicile claims from at least ***eight*** states whose maximum tax rate equals the federal credit of 7.2% in order to provide the necessary predicate for original jurisdiction under *Texas v. Florida*. Clearly, an original action in this Court could provide a remedy for multiple state death taxation, under the guise of resolving a dispute between states, only for the estates of the most wealthy and most mobile members of our society.

Finally, as more fully set forth in Texas' Brief in Opposition to California's Motion for Leave to File Complaint in No. 88, Original, even if this controversy could be categorized as a suit between states, it is not an appropriate one for exercise of this Court's original jurisdiction. As the Court recently noted,

> "[W]e have construed the congressional grant of exclusive jurisdiction under §1251(a) as requiring resort to our obligatory jurisdiction only in 'appropriate cases.' *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *Arizona v. New Mexico*, 425 U.S. 794, 796-797 (1976).
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> ...
>
> "[T]he issue of appropriateness in an original action between States must be determined on a case-by-case basis."
> (*Maryland v. Louisiana, supra*, 101 S.Ct. at 2125 & 2127)

The magnitude and nature of the injury California alleges it might suffer at the hands of Texas render this case an inappropriate one for an exercise of this Court's original jurisdiction. *See* Texas Brief in Opposition, No. 88, Original at 15-16. More importantly, the recent appearance by Petitioners in the Houston probate court proceeding provides an alternative forum where this dispute can be

settled. *Maryland v. Louisiana, supra; Arizona v. New Mexico, supra; Illinois v. City of Milwaukee, supra.*

2. The Texas Probate Court Has Jurisdiction Over All Parties Necessary To This Action.

There is currently pending in Probate Court No. 2 of Harris County, Texas ("Houston Probate Court") Cause No. 139,362, styled The Estate of Howard R. Hughes, Jr., Deceased. This cause has been pending since April 14, 1976. It is an ongoing proceeding in which the Houston Probate Court is determining all matters incident to the estate of Howard R. Hughes.

On July 21,1981, Petitioners filed a motion in the Houston Probate Court to remove original exhibits from the record. This motion was granted by Judge Pat Gregory, and the original exhibits were withdrawn by Petitioners. By virtue of so invoking the jurisdiction of the Houston Probate Court in the ongoing probate proceedings, petitioners Cory and Alvord have entered a general appearance—albeit inadvertently—in Cause No. 139,362, the Estate of Howard R. Hughes, Jr., Deceased. Of course, whether Petitioners intended to make a general appearance when they filed their motion is irrelevant to the impact of their action. For it has been the law of Texas since at least 1889 that

> "if, in the exercise of his own untrammeled volition, [the defendant] . . . makes an appearance, then he must be held bound thereby, as would be one who could be, but had not been, subjected to the jurisdiction of the courts here by the proper issuance and service of process. The purpose of which appearance is made is unimportant, as is the intention with which it is made, if the act done is one which the statute declares is such as gives to the court jurisdiction to render a personal judgment against the person appearing." *(York v. State,* 73 Tex. 651, 11 S.W. 869 (1889))

York is still the law in Texas today. *Toler v. Travis County Child Welfare Unit,* 520 S.W.2d 834 (Tex. Civ. App.—Austin 1975, no writ). In fact, Petitioners' act of withdrawing original, filed exhibits is one that only a party is permitted to do under Texas

law. Tex. R. Civ. P. 75b. By filing their motion to withdraw original exhibits, instead of simply inspecting or making copies of the exhibits as public records, Petitioners have invoked the jurisdiction of the Houston Probate Court and are now parties to that proceeding.

If this Court should determine that the issues of state tax law presented in this case should not be resolved in a federal district court, the matter can now be safely remitted to state court without fear of inconsistent adjudications of the domicile issue. The Houston Probate Court provides an alternative forum where the issues tendered in this case, and in *California v. Texas*, No. 88, Original, can be resolved. *Maryland v. Louisiana, supra; Arizona v. New Mexico, supra; Illinois v. City of Milwaukee, supra.*

It is uncertain whether Petitioners will argue that 28 U.S.C. §1251(a) precludes state courts, as well as the lower federal courts, from exercising jurisdiction over this matter. For the reasons already set forth in Part IB(1), *supra*, this dispute does not constitute a "controvers[y] between two or more States." Petitioners do suggest this argument by implication, however, by attributing unwarranted significance to a phrase lifted from *Maryland v. Louisiana, supra*, 101 S.Ct. at 2128, (Pet. Br. at 17 n. 21). Petitioners quote that portion of this Court's opinion which states: "a district court action brought by the United States, which necessarily would not include the plaintiff States, would be an inadequate forum in light of the present posture of this case." *Id.* The quoted passage would not appear to be a pronouncement of this Court's exclusive jurisdiction, but rather more likely refers to the perplexing problem of personal jurisdiction the Court had noted earlier: "there exists no procedural mechanism in Louisiana for the plaintiff States or the United States to be made parties to the state refund suit." *Id.*, 101 S.Ct. at 2126 n. 17.

That jurisdictional obstacle is wholly absent here, for Petitioners voluntarily entered an appearance in the proceeding pending in the Houston Probate Court. This unusual situation has occurred at least once before, and the state court exercised jurisdiction and resolved the controversy. *See In re Trowbridge's Estate,*

266 N.Y. 283, 194 N.E. 756 (1935). No less a scholar of this Court's jurisdiction than Justice Frankfurter approved that solution to state death tax disputes and certainly perceived no constitutional or statutory impediment to that exercise of state court jurisdiction. *Texas v. Florida*, 306 U.S. 398, 431 (1935) (opinion of Frankfurter, J.). That solution is available in this case as well.

II. Venue of This Action Is Now Properly Laid

The Federal Interpleader Act includes specific provisions for venue of actions brought pursuant to section 1335. These venue limitations are set forth in 28 U.S.C. §1397, which provides that such actions "may be brought in the judicial district in which one or more of the claimants reside." All parties concede that the Texas taxing officials reside in Austin, Texas and are claimants for inheritance taxes from the Hughes estate. Venue in Austin is indisputably proper under section 1397.

Petitioners, however, assert that the nature of this particular interpleader action makes venue in Austin "unfair" and "unseemly" (Pet. Br. at 6, 10, 11, 16 and 45) and requires transfer of the case to Denver, Colorado. This transfer is necessary, Petitioners claim, in order to provide a "neutral forum" for this litigation.[8] As a necessary predicate to their transfer motion under 28 U.S.C. §1404(a), Petitioners filed a motion to add as defendants some

8. In the District Court, Petitioners also moved, alternatively, that the case be transferred to Los Angeles, California. Having been unable to persuade either the District Court or Court of Appeals to transfer this action, Petitioners now argue here—for the first time—that 28 U.S.C. §1251(a) precludes *any* federal district court from exercising jurisdiction over this case. *See* Parts I(A)(1) & (B)(2), *supra*. And, to buttress their position that an original action in this Court is the only appropriate remedy for this dispute, Petitioners further contend that because the strictures of section 1397 do not permit transfer of this case to Colorado, section 1335 is "the wrong remedy." (Pet. for Cert. 14). While it is indeed true that Colorado is not a potential transferee forum, statutory interpleader is a viable remedy in this case if the Eleventh Amendment does not foreclose it.

twenty-two self-proclaimed heirs[9] of Hughes, one of whom was allegedly a resident of Denver, Colorado.

The district court denied Petitioners' motion to add parties and also denied their motion to transfer the case either to Los Angeles or to Denver. (Pet. App. D, E & F). The Fifth Circuit affirmed those rulings. (Pet. App. A). These decisions were clearly correct.

A. The Lower Courts Correctly Denied Petitioners' Motion to Add Parties.

Unhappy with the Hughes estate's decision to file this action in Austin, Petitioners realized in 1978 that a motion under 28 U.S.C. §1404(a) to transfer the case to California for the convenience of witnesses and parties would inevitably be denied for lack of merit. Since section 1397 restricts venue to districts in which a claimant resides, and because no claimant resided in a district where Petitioners alternatively desired venue, Petitioners filed a motion to add as defendants the twenty-two signatories to an inter-heir settlement agreement. (J.A. 25, 30). As the basis for this motion, Petitioners urge that these heirs must be joined to prevent relitigation of the domicile issue and to protect the heirs, who are personally liable for state inheritance taxes. (Pet. Br. at 40-43). In raising these professed concerns, Petitioners are tilting at self-constructed windmills fabricated solely for the unsubtle purpose of attempting to enlarge the number of potential transferee forums for a change of venue. This transparent attempt at forum manipulation fails because Petitioners' alleged fears of relitigation and unprotected personal interests of heirs are frivolous.

The primary reason why the heirs need not be joined to protect their individual interests is precisely the same reason why the heirs cannot relitigate any domicile finding reached in this interpleader

9. The Houston Probate Court ruled only two weeks ago that of the hundreds of persons claiming heirship under Texas law, the twenty-two signatories of this agreement were in fact the true heirs of Hughes. It is too early to know whether that ruling will be appealed. But the fact that it has taken more than five years for an initial ruling on heirship confirms that heirs, or potential heirs prior to resolution of the heirship question, cannot be necessary parties to an interpleader such as this.

action: the interests of the heirs are completely represented by the administrators of the estate, who have full authority to represent those interests. The very nature and extent of this representation ensure that interests of the heirs will be carefully protected, which in turn guarantees that the heirs will be bound by any judgment rendered herein.

The role of an administrator as the representative of the entire estate, including the interests of the estate's beneficiaries, is crystal clear under state law. An administrator has the duty to marshal the assets of an estate and the right to possession of those assets pending distribution. Cal. Prob. Code §571; Tex. Prob. Code §37; ***In re Estate of Turino,*** 8 Cal. App. 3d 642, 87 Cal. Rptr. 581 (1970); ***Atlantic Ins. Co. v. Fulfs,*** 417 S.W.2d 302 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.). An administrator also has broad authority to institute all suits necessary for the preservation of the estate pending distribution. ***In re Estate of Turino, supra; Carnes v. Meador,*** 533 S.W.2d 365 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); ***Glover v. Landes,*** 530 S.W.2d 910 (Tex. Civ. App.—Houston [1st] 1975, writ ref'd n.r.e.); Tex. Prob. Code §233. It is clear beyond cavil that the present interpleader action, brought to eliminate the possibility of both Texas and California imposing domicile-based death taxes on the intangibles of the estate, is one pursuant to the statutory rights and duties of an administrator to bring a suit necessary for the preservation of an estate. ***Id.*** The interests of the administrators and heirs in this proceeding totally coincide—both wish to preserve the largest estate possible by avoiding double taxation—and will be fervently represented by the administrators, who are under a fiduciary obligation to do so. ***See Humane Society of Austin & Travis County v. Austin Nat'l Bank,*** 531 S.W.2d 574 (Tex. 1975). Clearly, the heirs need not be joined to have their interests represented.

For this very reason, the heirs will be precluded from relitigating the issues decided in this interpleader action. This Court has repeatedly held that a person can be bound by the judgment in a proceeding to which he was not a party. ***Kersh Lake Drainage District v. Johnson,*** 309 U.S. 485 (1940); ***Chicago, R.I. & P. Ry. v. Schendel,*** 270 U.S. 611, 613-20 (1926); ***Heckman***

v. United States, 224 U.S. 413 (1912); *Shaw v. Railroad Co.,* 100 U.S. 605, 611 (1879); *Kerrison v. Stewart,* 93 U.S. 155, 160 (1879); *cf. Montana v. United States,* 440 U.S. 147 (1979) (non-party controlled prior litigation). Federal courts have recognized a variety of situations in which the relationship between a party and a non-party is "sufficiently close" to justify precluding the non-party, by applying *res judicata* or collateral estoppel, from relitigating issues resolved in his absence. *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84, 95 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977); *Aerojet-General Corp. v. Askew,* 511 F.2d 710, 719 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975); *see* Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27, 59-66 (1964); Vestal, *Res Judicata/Preclusion: Expansion,* 47 So. Cal. L. Rev. 357, 373-76 (1974).

One of the most well-settled situations in which this principle is applied to non-parties is encompassed by the rule that "a person whose interest was represented by one having authority to represent him is bound by the judgment, although he was not formally a party...." 1B *Moore's Federal Practice* ¶10.411[1] at 1253 (hereinafter "Moore"); *Expert Electric, Inc. v. Levine,* 554 F.2d 1227, 1233 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *Southwest Airlines Co. v. Texas International Airlines, Inc., supra.*

An example of this type of preclusion, demonstrating its appropriate application in the context of joinder, is found in *Heckman v. United States,* 224 U.S. 413 (1912). There the United States brought suit to set aside certain conveyances of lands allotted to Cherokee Indians, but conveyed by them during a period in which alienation of the land was prohibited by statute. The grantees of the land made the same argument Petitioners do here—that the Indian grantors, as owners of the land, should be joined as parties under *Shields v. Barrow,* 58 U.S. (27 How.) 130 (1854), in order to provide complete adjudication and to prevent relitigation. 224 U.S. at 444-45. The Court noted that the interest of the Indian grantors was represented completely by the United States and that "[t]heir presence as parties could not add

to, or detract from, the effect of the proceedings...." 224 U.S. at 445. The Court went on to explain:

> "[I]f the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. [citations omitted] And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question." (224 U.S. at 445-46)

Also subsumed within the rule that the preclusive effect of a judgment extends to a non-party whose interest was represented by a party with authority to do so is the relationship of fiduciary representative-beneficiary. As this Court explained in ***Sea-Land Services, Inc. v. Gaudet,*** 414 U.S. 573, 593-94 (1974):

> "[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties. In such cases, 'the beneficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship; they are ... bound by the rules of collateral estoppel in suits upon different causes of action,' F. James, Civil Procedure §11.28, p. 592 (1965)."

The fiduciary relationship between an estate administrator and an heir to an estate falls squarely within the ambit of this rule. ***See Southwest Airlines Co. v. Texas International Airlines, Inc., supra,*** 546 F.2d at 95; ***Pollard v. Cockrell,*** 578 F.2d 1002, 1008-1009 (5th Cir. 1978). As formulated by Professor Moore in traditional terminology, the rule is that "the administrator or executor on the one hand and the heirs ... on the other, are privies on the basis of their concurrent relationship to the personal property...", 1B Moore ¶10.411[12] at 1665, "so that a judgment

rendered for or against one party to the relationship is normally conclusive... in litigation by or against the other...." *Id.* at 1672. Not surprisingly, federal courts have reached this same conclusion, holding that the preclusive effect of a judgment rendered against the administrator of an estate extends to nonparty beneficiaries of the estate. *Chicago, R.I. & P. Ry. v. Schendel,* 270 U.S. 611, 620 (1926); *McCrocklin v. Fowler,* 285 F.Supp. 41 (E.D. Wis. 1968), *aff'd,* 411 F.2d 580 (7th Cir. 1969).

The validity of this conclusion is confirmed by Rule 17(a) of the Federal Rules of Civil Procedure, which codifies long-recognized federal practice by providing that an executor or administrator is the real party in interest and may sue in his own name *without joining* the party for whose benefit the action is brought. *See Childress v. Emory,* 21 U.S. (8 Wheat.) 642, 669 (1823); *Mecom v. Fitzsimmons Drilling Co.,* 284 U.S. 183 (1931); *Boeing Airplane Co. v. Perry,* 322 F.2d 589 (10th Cir. 1963), *cert. denied,* 375 U.S. 984 (1964); *Estate of Johnson v. Bellville Hospital,* 56 F.R.D. 380 (S.D. Tex. 1972); *McElroy v. Security Nat'l Bank,* 215 F.Supp. 775 (D. Kan. 1963).

The purpose of the real party in interest rule was stated in the Advisory Committee Note to the 1966 amendment to Rule 17(a):

> "[T]he modern function of the rule in its negative aspect is simply *to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.*" (39 F.R.D. 69, 85 (1966)(emphasis added); *see Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1208 (9th Cir. 1975), *cert. denied,* 425 U.S. 959 (1976)).

Thus Rule 17(a) incorporates, as one of the basic tenets of federal procedure, the principle that a beneficiary of an estate is bound by a judgment rendered in his absence against the executor or ad-

ministrator of the estate.[10]

Petitioners seek to avoid this long-standing precedent by asserting that the heirs are personally liable for state death taxes and therefore they, not the administrators, are the real parties in interest, and the administrators are incapable of representing the heirs. The cornerstone of this argument is *Allen v. Flournoy*, 26 Cal. App. 3d 774, 103 Cal. Rptr. 275 (1972), which Petitioners would interpret as making the heirs indispensable parties to any proceeding which would affect the amount of death tax to be paid by an estate. Petitioners' argument is ill-conceived for at least three reasons: one, it misinterprets *Allen v. Flournoy;* two, the existence of potential personal liability on the part of the heirs does not affect the application of the preclusion doctrine; and, three, heirs are not indispensable parties to a lawsuit involving a liability or an asset that falls directly upon the heirs rather than upon the estate.

Petitioners stretch *Allen v. Flournoy, supra,* beyond the breaking point; that case will not support the ponderous weight of Petitioners' argument. In *Flournoy,* the court merely held that due process requires that all heirs who are easily ascertainable be given notice of the tax appraiser's report in a proceeding which fixes inheritance taxes on the transfer of *non-probate* property. *See Westinghouse Electric Corp. v. County of Los Angeles,* 42 Cal. App. 3d 32, 116 Cal. Rptr. 742 (1974); *Johnson v. Alma Investment Co.,* 47 Cal. App. 3d 155, 120 Cal. Rptr. 503 (1975). It does not hold that heirs must be joined in every proceeding which could affect, directly or indirectly, an

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10. This universally-accepted principle is also recognized in section 85 of the Restatement (Second) of Judgments (tentative draft No. 2, 1975) which provides, in pertinent part:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the rules of res judicata as though he were a party. A person is represented by a party who is:
>
> ...
>
> (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary;...

estate's inheritance tax liability. In fact, it does not even hold that heirs are indispensable parties to proceedings which fix the inheritance tax liability for property which passes under a will or by intestacy. The quotation from *Flournoy* upon which Petitioners so heavily rely—"'the heirs are 'indispensable part[ies] to that portion of the proceeding in which inheritance taxes [are] fixed....'", *Allen v. Flournoy*, 26 Cal. App. 3d 774, 781, 103 Cal. Rptr. 275, 279 (1972)—clearly limits any possible application of *Flournoy* to a "'proceeding in which inheritance taxes [are] fixed.'" In this case, no inheritance tax will be fixed and no heir will be held personally liable for any tax. All that will be determined in this case is the domicile of Howard Hughes at the date of his death, the threshold issue to any assessment of an inheritance tax. Following Petitioners' reasoning to its logical, but absurd, end, courts would be required to join the heirs at every stage of any proceeding which might affect the inheritance tax due. Such a result would immensely and irrationally encumber the inheritance tax and probate system and is not required. *Cf. Lennefelt v. Cranston*, 231 Cal. App. 2d 171, 41 Cal. Rptr. 598 (1964).

Petitioners' conjured specter of the potential personal liability of the heirs does not make the heirs the real parties in interest in this proceeding, nor does it alter the application of the traditional principles of preclusion set forth above. This Court recently explained that, at least for procedural purposes—which surely include joinder—Rule 17(a) determines who is the real party in interest. *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 462 (1980). Moreover, Petitioners offer no reason why the administrators cannot or should not represent whatever interest the heirs may have in this tax proceeding. Petitioners fail to differentiate this potential tax claim against the heirs from the multitude of other tax claims and creditors' claims which are regularly handled by estate administrators. Because any California inheritance taxes would be paid by the administrator prior to distribution of the estate (Cal. Rev. & Tax. Code §§14121, 14127), as will all other estate liabilities, the fact that the heirs might be personally liable for such taxes is truly a distinction without a difference. This case is simply one brought by the administrators to preserve the assets of the estate and is the first step in the long taxing process. As such, it

falls into the general category of lawsuits which an administrator is empowered to bring for the benefit of the heirs, in which, according to Professor Wright, the heirs need not be joined.

> "Normally, however, state substantive law gives the administrator or executor control of a suit for wrongful death, and the fiduciary is not required to join the persons for whose benefit the action is brought; the same would be done in a federal court action."
> (6 C. Wright & A. Miller, ***Federal Practice & Procedure*** §1548 at 670)

An additional line of cases illustrates the error in Petitioners' position that the potential heirs are indispensable parties to this litigation because the tax liability which will be affected by the outcome of this suit falls on the heirs rather than the estate. It is well settled that in determining diversity jurisdiction, courts must look, ***sua sponte*** if necessary, at the citizenship of indispensable parties to the litigation. The court must join them if they are not parties even if to do so would defeat diversity jurisdiction. ***E.g., Jett v. Zink,*** 362 F.2d 723 (5th Cir. 1966). On several occasions, courts have held that even where the asset (and conversely the liability) belongs to the heirs and not to the estate, if the administrator is authorized to bring the lawsuit, then the court should look only to his citizenship. ***Mecom v. Fitzsimmons Drilling Co., supra; Bush v. Carpenter Brothers, Inc.,*** 447 F.2d 707 (5th Cir. 1971); 13 C. Wright, A. Miller & E. Cooper, ***Federal Practice & Procedure,*** §3606 (1975). In ***Mecom v. Fitzsimmons, supra,*** the Supreme Court noted with approval the rule that in wrongful death cases in which by statute the amount recovered belongs to the heirs and not to the estate, the citizenship of the administrator, ***i.e.*** the indispensable party, controlled. Consequently, it follows than even in such cases, heirs are not indispensable parties and need not be joined.

Petitioners' simultaneous solicitude for the interest of the heirs and fear of relitigation by them are made even more unbelievable by the fact that Annette Gano Lummis, the now-deceased aunt of Howard Hughes, is the sole heir to the Hughes estate under California law. Cal. Prob. Code §226. The executor of her estate

is therefore the only person other than the administrators of the Hughes estate liable to the State of California for its inheritance tax. Cal. Rev. & Tax. Code §14101. While the heirs may agree among themselves as to the distribution of the estate and the apportionment of the inheritance tax, the tax itself becomes fixed at death, and such an agreement does not affect the right of California to the tax or change the basis upon which it is to be computed. *Cohn v. Cohn,* 20 Cal. 2d 65, 123 P. 2d 833 (1942); *In re Estate of Rossi,* 169 Cal. 148, 146 P. 430 (1915); *In re Estate of Holt,* 61 Cal. App. 464, 215 P. 124 (1923); *Kelso v. Sargeant,* 11 Cal. App. 2d 170, 54 P. 2d 26 (1936). In other words, the settlement agreement is disregarded in computing the inheritance tax due. California Controller's Inheritance Tax Regulation 13409(b); Cal. Admin. Code Tit. 19, p. 660.4; CCH Inheritance, Estate and Gift Taxation Reporter, State Vol. 1, ¶15,318; *Cory v. Walsh,* 72 Cal. App. 3d 895, 140 Cal. Rptr. 462 (1977).

Though as a practical matter the administrator, as required by law, will pay all inheritance taxes prior to distribution of the estate, if distribution were to occur prior to the deduction of the tax, the administrator and the executor of Mrs. Lummis' estate would alone be liable to California. Cal. Rev. & Tax. Code §§14121, 14143; *In re Pearson's Estate,* 90 Cal. App. 2d 436, 203 P. 2d 52 (1949); *Cohn v. Cohn, supra.* The signatories to the settlement agreement would be liable only to the estate of Mrs. Lummis, and solely because of their private contractual agreement to pay a portion of the tax in relation to their distributed share. These signatories thus never enter the picture for purposes of California's inheritance tax and certainly will not be personally liable for it. Petitioners clearly have nothing to fear from, and no legitimate concern about, the signatories to the settlement agreement.

Finally, for an intensely practical reason, the joinder of heirs or potential heirs cannot be proper in an action such as this. This is not a proceeding to determine who the heirs are or what their tax liabilities may be. The entire estate has not been tendered into the registry of the Court for a resolution of all claims against it. This suit will resolve only the issue of domicile—the threshold inquiry in

the taxing process—and the heirs have no role to play in such a lawsuit.

It is unrealistic to suggest that at the second stage of such an interpleader, all the potential heirs, and their respective attorneys, will be controlling the litigation on behalf of the estate. For if the domicile issue were in the control of the various potential heirs, these heirs would presumably be free to make their own peace with the claimant taxing authorities, which could result in a hodgepodge of settlements that could turn the remainder of the administration, as well as the remainder of the interpleader action, into a circus. In addition, potential heirs, who are not even assured of a share in the estate assets, would be forced to bear the substantial costs of litigating the merits of the domicile issue.

The scenario would be even more bizarre in this case, where the intestacy laws of the asserted domiciliary states differ. Petitioners seek to join a person—allegedly a resident of Denver—who is an heir only under the intestacy laws of Texas, in order to bootstrap a change of venue from Texas to Colorado in an effort to obtain a California domiciliary finding, which would render the alleged resident of Denver not an heir at all and would consequently establish that his residence could not have supported a change of venue. The irony of that situation confirms that the law of joinder does not permit, and surely cannot require, that the heirs be added as parties.

B. The Lower Courts Correctly Denied Petitioner's Motion to Transfer This Case

Petitioners contend that if the heirs are joined, this Court ***is required*** to uproot this litigation from the district where it has been pending for more than three years and summarily drop it more than one thousand miles away on the unwitting courts and people of Denver, Colorado. This remarkable contention is made without so much as a mention of the factors under 28 U.S.C. §1404(a) that govern such a transfer or the evaluation of those factors made by the district court in denying Petitioners' motion to transfer the case to Los Angeles. Petitioners rely solely on a talismanic invocation of the term "juror prejudice"—which is unsubstantiated, un-

justified, and unfair—to argue that all traditional legal and factual reasons for denying this transfer can and should be overridden in the name of "the interest of justice". However, "[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953). Justice is best attained when a "body of law developed over a period of years is evenhandedly applied." *Federated Dept. Stores, Inc. v. Moitie*, __U.S.__, 101 S.Ct. 2424, 2429 (1981). Here, the law is clear that transfer was properly denied.

The most complete and well-reasoned judicial treatment of the venue arguments advanced by Petitioners demonstrates that the conclusion reached by the district court in Austin would also have been reached by the federal judiciary of the Central District of California. For in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 89 F.R.D. 497 (C.D.Cal. 1981)(hereinafter "*L.A. Coliseum v. NFL*"), all of Petitioners' "neutral forum" arguments, and then some, were fully reviewed and rejected. For those same reasons, plus the fact that Colorado is not an available transferee forum here, the denial of Petitioners' motion for change of venue should be affirmed.

First, as Petitioners concede, unless the heirs are joined this case cannot be transferred to Denver because no claimant would reside there and the District of Colorado would therefore not be one where this action "might have been brought" in the first instance. 28 U.S.C. §§1397, 1404(a). But even if the twenty-two signatories to the inter-heir settlement agreement are joined as parties, this same impediment exists, for there has been absolutely no showing that any of those twenty-two signatories resided in Colorado on July 14, 1978, when this suit was filed. Because the relevant date for determining where an action "might have been brought" is the date of the filing of the original complaint, it is incumbent upon Petitioners to prove that as of July 14, 1978, a claimant resided in Colorado. *Allegaert v. Chemical Bank*, 432 F.Supp. 685 (E.D.N.Y. 1977); *Harry Rich Corp. v. Curtiss-Wright Corp.*, 308 F.Supp. 1114 (S.D.N.Y. 1969); *Leith v. The Rocroi*, 203 F.Supp. 48 (S.D. Tex. 1962); *cf.*

Hoffman v. Blaski, 363 U.S. 335 (1960); Rule 15, Fed. R. Civ. P.

The record below does not contain a morsel of proof that a claimant resided in Colorado at the time this suit was brought. In fact, there is not even an allegation to that effect. The only allegations that a claimant resides in Colorado are found in California's Memorandum in Support of Motion for Change of Venue.

> "As shown in Exhibits F and G to the Mayer affidavit, these additional parties reside in Texas, Massachusetts, Ohio, Florida and Colorado." (R.I. 85).
>
> "As the granting of our motion for joinder of additional parties will require Plaintiffs to file an Amended Complaint which includes an heir resident in Colorado, that district is one where this case could be brought within the meaning of Section 1404(a)". (R.I. 88).

Neither of these allegations assert that a party sought to be joined was a resident of Colorado on July 14, 1978. Moreover, mere allegations without factual support are insufficient to support a 1404(a) motion. *Kisko v. Penn Central Transportation Co.,* 408 F.Supp. 984 (M.D. Penn. 1976).

Petitioners' factual support is deficient. They rely entirely on the affidavit of Steven L. Mayer, dated August 24, 1978, and exhibits F and G attached thereto. (J.A. 24-32). Neither this affidavit nor the attached exhibits indicate that an heir resided in Colorado on July 14, 1978.

> "The known heirs to the Hughes estate have entered into a series of settlement agreements, which purport to distribute the estate to the heirs in specified percentages, irrespective of the state ultimately found to be Mr. Hughes' domicile.
>
> Attached hereto as Exhibit F-1 is a true and correct copy of the original Settlement Agreement reached between the heirs in 1976; and Exhibit F-2 attached hereto is a true and correct copy of the Supplemental Agreement signed in 1977. Attached to the agreements are true copies of the notarized signatures of the heirs which,

> assuming the heirs signed the agreement in their states of residence, indicates their geographical distribution. It can be seen that, as of the date of the recent Supplemental Agreement, the heirs resided in Ohio, Massachusetts, Colorado, Texas and Florida. A list of the heirs which shows the date and place they signed the Supplemental Agreement is attached hereto as Exhibit G. In addition, I have been informed by members of the firm of Andrews, Kurth, Campbell and Jones, counsel for plaintiffs herein, that at least one heir presently resides in the District of Colorado." (J.A. 24-25).

What this affidavit does *not* state is significant. It does not state which heir allegedly resides in Colorado, nor does it state that any heir resided in Colorado on July 14, 1978.

Exhibits F and G do not contain any factual proof than an heir resided in Colorado on July 14, 1978. Petitioners rely on the assumption that the heirs signed the Settlement Agreement and Supplemental Agreement in their state of residence, and then note that several of the heirs signed these documents in Colorado. This proof is insufficient for two reasons. First, the assumption that the heirs signed in their place of residence is unfounded. The heirs could have signed in Colorado and lived elsewhere. The exhibits themselves indicate as much. Three of the heirs, Elspeth De Pould, Margot Fleming Houstoun and John McIntosh Houstoun, acknowledged the original agreement on July 10, 1976 in Colorado. (J.A. 27). As to the Supplemental Agreement, however, De Pould acknowledged in Cuyahoga County, Ohio, (J.A. 32), and Margot Fleming Houstoun acknowledged in Harris County, Texas. (J.A. 34). Only John McIntosh Houstoun acknowledged in Colorado, and this was done June 10, 1977. (J.A. 34). Allene Lummis Russell acknowledged once in Texas and once in Massachusetts. (J.A. 28, 33). Barbara Cameron executed once in California and once in Ohio. (J.A. 29, 32). And Richard C. Gano, Jr., the administrator of the estate of Howard Hughes in California, who by statute must be a resident of California,[11] executed the Sup-

11. Cal. Prob. Code §420 requires administrators to be bona fide residents of California.

plemental Agreement in Harris County, Texas. (J.A. 33). Even if the site of signing these agreements were proof of the signatories' residence as of the date of signature, none of the dates on which the alleged Colorado residents signed the documents is related to the determinative date of July 14, 1978. Thus, the statements concerning residence in the Mayer affidavit are merely unsupported conclusions, which will not support a change of venue. *Texas Gulf Sulpher Co. v. Ritter,* 371 F.2d 145 (10th Cir. 1967); *Jones v. Walt Disney World Co.,* 409 F.Supp. 526 (W.D.N.Y. 1976); *Sinclair Oil Corp. v. Union Oil Co. of California,* 305 F. Supp. 903 (S.D.N.Y. 1969).[12]

Should this Court find that Colorado is a forum where this suit might have been brought on July 14, 1978, this case still should not be transferred. Petitioners have not met their burden of showing that it is in the interest of justice that the case be transferred to Colorado, nor have Petitioners even addressed the other factors under 28 U.S.C. §1404(a), which militate strongly against the proposed transfer.

The reasons offered in support of a transfer to Colorado all rest on an assumption of juror prejudice. Petitioners assert that the minute financial interest which Texas jurors might have in the outcome of the case, "the parochial effects of local and regional pride" (Pet. Br. 13), and the influence of prior publicity covering the 1978 Houston domicile trial make it impossible to hold a fair trial in Austin, Texas.[13] These arguments that a transfer is

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12. Nor does the statement that Mr. Mayer had been informed that "at least one heir presently resides in the District of Colorado" add any strength to his affidavit, for it does not indicate that an heir resided in Colorado on July 14, 1978.

13. Petitioners further claim that it is "inappropriate to compel a state to resort to the tribunals of another state for redress" because it will have an impact on state sovereignty. (Pet. Br. 16). This concern about state sovereignty is nothing more than a reiteration of Eleventh Amendment and sovereign immunity concepts. However, for a district court to have jurisdiction over this interpleader action, it will necessarily have been held that the Eleventh Amendment and sovereign immunity do not apply. That being the case, Petitioners' sovereignty concerns evaporate as well, since no state's sovereignty will be challenged.

(footnote continued on following page)

necessary to provide a "neutral forum" ignore the very logic underlying the grant of diversity jurisdiction to federal courts. Petitioners would be submitting their claims to a federal district court, a "national tribunal," (*Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888)), whose jurisdiction under 28 U.S.C. §1335 would be bottomed on diversity of citizenship. The very rationale for that jurisdictional grant was that a federal district court would provide a forum in which out-of-state litigants could escape local prejudice. 13 C. Wright & A. Miller, *Federal Practice & Procedure*, §3601 at 574 (1972).

Petitioners contend that even if the district court were fair, Texas jurors would not be. This assumption of juror bias dangles from three thin strands—pecuniary interest, regional pride, and prior publicity—which cannot support a transfer. The primary argument is that the dizzying sum of $6.02[14] that each juror might stand to gain in taxes by a verdict of Texas domicile would make the jury panel ignore their sacred juror's oath and render a verdict based on pecuniary self-interest rather than on the evidence adduced. Merely to state this reasoning shows why the cases relied on by Petitioners are inapposite. For in contrast to this case, the fact finder in *Tumey v. Ohio*, 273 U.S. 510 (1927), received approximately $100 per month from his pecuniary interest in convictions, while the justice of the peace in *Connally v. Georgia*, 429 U.S. 245 (1977), made more than $50,000 in three years by issuing

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Furthermore, even if Petitioners were right about the impact on state sovereignty, transfer of this case to Colorado would only exacerbate the problem, for then two, rather than one, sovereign states would be required to litigate their claims in a sister state.

14. In the petition for certiorari, Petitioners claimed that each juror's stake in the outcome of the case would be $12.34, a figure based on the valuation of the Estate by the California inheritance tax referee. Petitioners now utilize the valuation by the Internal Revenue Service, apparently recognizing that under the California valuation of the Hughes estate, ample assets exist to satisfy the tax claims of the United States, California and Texas, thus precluding original jurisdiction in this Court under *Texas v. Florida, supra.* *See* Texas' Brief in Opposition, *California v. Texas*, No. 88, Original, at 8-12.

warrants, and those fees were his salary. Here, there is no substantial, repeating and direct interest by Texas jurors as existed in *Tumey* and *Connally*. The one-time, indirect interest of $6.02 that a juror might have is clearly *de minimus* and does not mandate transfer of the case. *L.A. Coliseum v. NFL, supra; Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D. Va. 1975); *cf. Dugan v. Ohio*, 277 U.S. 61 (1928) (distinguishing *Tumey*).

The suggestion that "the pride and affection which each Texas juror justifiably has for the State of Texas" (Pet. Br. 13) would cause the rendition of an improper verdict is the unkindest cut of all. Nothing is more "unfair" and "unseemly" than this attempt to twist the concept of "Texas pride" to impugn the integrity, impartiality and honesty of Texas jurors. That pride is based on the very qualities Petitioners now call into question. When a similar argument was made by the NFL about the emotional and political biases of Los Angeles jurors concerning an issue infinitely more charged with emotion than the dry question of domicile—the location of a professional football team—the court noted that, as here, "there has been no attempt to compile any statistical or survey data to substantiate this claim" and decided that "any decision on the extent of alleged 'emotional' or 'political' biases must await further substantiation in the context of the voir dire." *L.A. Coliseum v. NFL, supra*, 89 F.R.D. at 510.

Petitioners' professed fears about publicity concerning the prior state court domicile trial and verdict are similarly unfounded. These arguments were weak and exaggerated when first offered to the district court in the fall of 1978, some eight months after the end of the Texas trial. Now, almost four years after that trial, any possible impact of media coverage in the Austin area about the Houston trial has completely dissipated. By the time this case reaches trial, no residual effect of prior publicity could possibly exist.

The voir dire process is designed to screen any potential juror who may actually be affected by the factors which worry Petitioners. If this case is to be transferred due to juror partiality, it should only be done by the district court after a thorough voir dire examination, rather than on the basis of Petitioners' unfounded

assumptions. *See United States v. Haldeman*, 559 F.2d 31, 62-63 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Lamb*, 575 F.2d 1310, 1315 (10th Cir.), cert. denied, 439 U.S. 854 (1978) ("The proper occasion for determining juror partiality is upon voir dire examination.").

> "Since the defendants here have submitted no such evidence [statistical evidence or the results of opinion polls], and since the copies of newspaper articles thus far submitted do not compel a conclusion, prior to voir dire, that six fair and impartial jurors cannot be found in this district, the argument that the central district is not a 'fair and impartial' forum due to pre-trial publicity must be rejected at this time." (*L.A. Coliseum v. NFL, supra*, 89 F.R.D. at 509)

There has been absolutely no showing that the system of voir dire and juror instruction will be incapable of handling any potential juror bias in this case. The Court should not indulge Petitioners' assumptions[15] that the system will not work, when the appropriate presumption is that it will. "[I]t is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court...", *United States v. Sorcey*, 151 F.2d 899, 903 (7th Cir.), *cert. denied*, 327 U.S. 794 (1945), and "we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists." *Chicago, R.I. & P.Ry. v. Igoe*,

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15. Petitioners' conclusions of juror prejudice would require acceptance of the following assumptions: (1) that Austin jurors will be aware that a Texas domiciliary finding will affect Texas inheritance tax revenues (2) in a large amount (3) so that they will each benefit (4) by a maximum of $6.02; (5) that Austinites have immense pride in their heritage as Texans and (6) would be proud to consider Howard Hughes a fellow Texan; (7) that the venire lived in Austin five to eight years prior to trial (when the prior publicity occurred), (8) read the Austin newspapers then, (9) read the Hughes articles in the newspapers, and (10) remembered what they said; (11) that because of all of the above, the jurors will be unable to view the evidence impartially and (12) that the judge will be unable to ferret out those jurors who are unable to act impartially.

Obviously, this amazing string of assumptions and inferences cannot support a change in venue.

212 F.2d 378, 382 (7th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955). *Accord, Patterson v. Louisville & Nashville R.R.*, 182 F.Supp. 95 (S.D. Ind. 1960).

Petitioners' view of the interest of justice is unduly weighted with self-interest. The trial of this case could well last several months, which will work an extraordinary hardship on the jurors selected to hear the case. As this Court has stated, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509(1947); *Flintkote Co. v. Allis-Chalmers Corp.*, 73 F.R.D. 463 (S.D.N.Y. 1977). It is not in the interest of justice to saddle the citizens of Denver with the time-consuming and expensive burden of this trial.[16]

Aside from their comments on the interest of justice, Petitioners do not even mention the factors which govern a transfer sought under 28 U.S.C. §1404(a). Although "venue is primarily a matter of convenience of litigants and witnesses," (*Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen, supra*, 387 U.S. at 560), Petitioners do not address these concerns. The reason for that omission, of course, is that the traditional considerations under section 1404(a) point directly to Austin as the appropriate forum for this litigation.

A trial in this case will involve three sets of litigants: Petitioners, respondents White and Bullock, and the Estate administrators. The lawyers for the Estate are located in Houston, Texas, as are the tens of thousands of documents in the Estate's possession relevant to the domicile question. (J.A.

16. The four concurring Justices who suggested this interpleader action presumably felt that the jurors in either Texas or California could hear this case with due impartiality. The concurring opinions never mention the prospect—let alone the necessity—of joining the heirs as claimants in order to make available an alternative, "neutral" forum. In fact, if the Eleventh Amendment does not bar such interpleader actions, venue in most future domicile cases would be laid in a claimant state by necessity. For example, if someone dies leaving his or her entire estate to his or her spouse, and two states claim to be the domiciliary state, it is highly likely that the spouse would reside in one of those two claimant states. In such case, even under Petitioners' expansive joinder argument, the only permissible forums would be in the claimant states.

139-140). Given this three party setting, a trial in Austin would be convenient for two of the three groups of parties. A trial in Los Angeles would be relatively convenient for Petitioners, and very inconvenient for the other parties. And a trial in Denver would be extremely inconvenient for all of the parties and their attorneys, and would cause litigation costs to skyrocket. *See L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501; *Altman v. Deramus,* 342 F.Supp. 72, 76 (S.D.N.Y. 1972); *Mobil Oil Corp. v. W. R. Grace & Co.,* 334 F.Supp. 117, 124 n. 5 (S.D. Tex. 1971).

> "Thus, unlike the usual transfer motion, where the court is asked to balance an increase in costs for one party against a significant decrease in the costs of another, the transfer requested here would result in greatly increased costs for every party to the suit." *(L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501)

The convenience of witnesses is often considered the most important factor governing transfer. *See L.A. Coliseum v. NFL, supra,* 89 F.R.D. at 501; *Saminsky v. Occidental Petroleum Corp.,* 373 F.Supp. 257, 259 (S.D.N.Y. 1974). While the great majority of the witnesses who testified at the prior Texas domicile trial reside in Texas, California, or Nevada, only two of those seventy-three witnesses reside in Colorado. Because of the age and health of many of the witnesses who knew Hughes in his earlier, less reclusive days, a trip into the high altitude of Denver would not only be vastly inconvenient, but perhaps dangerous. In this case, Denver would be a terribly inconvenient and expensive forum for all concerned.

Finally, because a plaintiff's choice of forums is strictly limited by applicable venue provisions—here, by 28 U.S.C. §1397—courts have often stated that the plaintiff's ultimate selection of venue should not be lightly disturbed. *See, e.g., Northern Acceptance Trust* 1065 *v. Gray,* 423 F.2d 653, 654 (9th Cir.), *cert. denied,* 398 U.S. 939 (1970); 1 *Moore's Federal Practice* ¶0.145[5] at 1616 (2d ed. 1980).

The Texas taxing officials have already expended a vast amount of time, and not an insubstantial amount of money and personal effort, litigating the issue of Hughes' domicile in state court. The Estate, which selected Austin venue, also incurred large litigation expenses during the Texas trial. Only Petitioners, who sat on the sidelines watching that initial fray, have yet to make significant outlays for litigation expense. Not surprisingly, it is Petitioners who now seek a transfer which will drastically increase litigation costs for all parties. The expenditures made during the prior Texas trial are due in no small measure to Petitioners' failure to assert any domicile claim with respect to Hughes until the very eve of the Texas trial. If relitigation of the domicile issue is to occur, with the attendant waste of most of the expense of the prior trial, venue of that relitigation should be laid in Austin, with the enormous savings of time and money that an Austin trial will mean to the Texas officials. And, of course, the concomitant savings in litigation expense by the Estate will benefit all parties, as it will increase the corpus of the estate upon which taxes may be assessed.

The District Court evaluated all of the factors appropriate under section 1404(a), and the evidence adduced with respect to those factors. In its discretion, the District Court correctly determined that Austin, Texas is the most appropriate forum for this case. That decision was a wise one, and certainly not an abuse of the District Court's discretion. The Court of Appeals affirmed that ruling. These decisions should not be reversed, and transfer of this case should not be ordered.

CONCLUSION

If the Eleventh Amendment is found to bar this action, these disputes between the Hughes estate and state taxing officials should be resolved in state court. However, if this action can proceed consistently with the Eleventh Amendment, statutory interpleader jurisdiction is present, the proper parties have already been joined, and venue of the case is now properly laid.

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